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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. [redacted] 37
CIVIL.

GENE DURFEE AND LAURA DURFEE,
Petitioners,

vs.

JULIA E. DUKE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 593.

CIVIL.

GENE DURFEE AND LAURA DURFEE,
Petitioners,

vs.

JULIA E. DUKE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

ADDITIONAL STATEMENT OF THE CASE.

Prior to 1855 the main channel of the Missouri River flowed to the north and east of the location of the land now in controversy (R. 32). The survey of 1855-1856 shows the main channel had moved west and south but was still east and north of the land in question (R. 32).

Long prior to the early 1900's this land had ceased to exist. There is no consecutive record of ownership either in Nebraska or Missouri, and no Nebraska or Missouri abstracts to show a continuous chain of title.

In 1916 Respondent's father first acquired land of which the land in question is now a part (R. 37). In the early 20's there was land south and west of Respondent's father's land (R. 37). The alleged Nebraska owners did not exercise any supervision or occupancy of the land from the late 30's or early 40's. This litigation was instituted in 1959 (R. 40). On the other hand, Respondent was in unquestioned possession of the land from 1943 until the present time (R. 40). In 1943 Respondent used a portion of the land and cleared a portion of it (R. 38). In 1946 she secured a swamp land deed from Holt County, Missouri. From year to year thereafter Respondent continued to put forth efforts to bring portions of the land under cultivation (R. 38). A cottonwood tree was cut from this land in 1959 and the tree was aged by a state forester of Missouri. It was the largest tree on the land and its age was thirty-five years (R. 37).

The petitioners obtained a sheriff's deed to this property from Richardson County, Nebraska in 1956, as a result of a tax foreclosure sale (R. 32). Petitioners never have been in possession or occupancy of the land.

SUMMARY OF ARGUMENT.

I.

Where the question of title to real estate is litigated in the Courts of one state the jurisdiction of the Court trying the case may be collaterally attacked in the Courts of another State, and the Courts of the second State are not bound by the finding of the Courts of the first state as to jurisdiction of the subject matter.

A.

The Courts of the second State are not foreclosed by the full faith and credit clause of the Federal Constitution from questioning the jurisdiction of the Courts of the first State.

Adam v. *Saenger*, 1938, 303 U.S. 59, 82 L. ed. 649, 58 S. Ct. 454.

Chicago L. Ins. Co. v. *Cherry*, 1917, 244 U.S. 25, 61 L ed. 966, 27 S. Ct. 492.

Davis v. *Davis*, 1938, 305 U.S. 32, 83 L. ed. 26, 59 S. Ct. 3.

Grover & Baker Sewing Machine Co. v. *Radcliffe*, 1890, 137 U.S. 287, 34 L. ed. 670, 11 S. Ct. 92.

Milliken v. *Meyer*, 1940, 311 U.S. 457, 85 L. ed. 278, 61 S. Ct. 339.

Sherrer v. *Sherrer*, 1948, 334 U.S. 343, 92 L. ed. 1429, 68 S. Ct. 1087.

Thompson v. *Whitman*, 1874, 85 U.S. (18 Wall.) 457, 21 L. ed. 897.

Western Union Telegraph Co. v. *Pennsylvania*, 1961, 368 U.S. 71, 7 L. ed. 2d 139, 82.

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81 C.J.S. 903.
50 C.J.S. 38, 502.
30 A Am. Jur. 176, 197.
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Restatement, Judgments, Par. 5 (i), (k), Par. 4 (b), Par. 71 (b).
Restatement, Conflicts, Par. 48.

B.

The Courts of the Second State are not bound by the doctrine of *res judicata* and may collaterally question the jurisdiction of the courts of the first State of the subject matter.

Baldwin v. *Iowa State Traveling Men's Assoc.*, 1931, 283 U.S. 522, 75 L. ed. 1244, 51 S. Ct. 517.

Carpenter v. *Strange*, 141 U.S. 47; 35 L. ed. 649, 11 S. Ct. 851.

Chicago L. Ins. Co. v. *Cherry*, 1917, 244 U.S. 25, 61 L. ed. 966, 27 S. Ct. 492.

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Jackson v. *Irving Trust Co.*, 1941, 311 U.S. 494, 85 L. ed. 297, 61 S. Ct. 326.

Milliken v. *Meyer*, 1940, 311 U.S. 457, 85 L. ed. 278, 61 S. Ct. 339.

Milwaukee County v. *M. E. White Co.*, 296 U.S. 268, 80 L. ed. 220, 56 S. Ct. 229.

Olmstead v. *Olmstead*, 216 U.S. 386, 54 L. ed. 530, 30 S. Ct. 292.

Stoll v. *Gottlieb*, 1938, 305 U.S. 165, 83 L. ed. 104, 59 S. Ct. 134.

Thompson v. *Whitman*, 1874, 85 U.S. (18 Wall.) 457, 21 L. ed. 897.

Treinies v. *Sunshine Mining Co.*, 1939, 308 U.S. 66, 84 L. ed. 85, 60 S. Ct. 44.

United States v. *171.74 acres of land, etc.*, D.C. Neb. 206 F. Supp. 322.

United States v. *United States Fidelity & Guaranty Co.*, 1940, 309 U.S. 506, 84 L. ed. 894, 60 S. Ct. 653.

Valtely v. *Northern Fire & Marine Insurance Co.*, 1920, 254 U.S. 348, 64 L. ed. 297, 41 S. Ct. 116.

50 C.J.S. 38, 502.

30 A Am. Jur. 176, 197.

2 A.L.R. 2d 1188.

Restatement, Judgments, Par. 5 (i), (k), Par. 4 (b), Par. 71 (b).

Restatement, Conflicts, Par. 10, Par. 451.

Restatement, Conflicts (1948 Supp.), Par. 451 (2).

ARGUMENT.

(A) Full Faith and Credit.

It is the position of the Respondent that in a situation where the question of jurisdiction of the subject matter has been litigated in the Courts of one State and the subject matter is realty, the full faith and credit clause does not prevent the Courts of the sister State from collaterally attacking this matter and again questioning the jurisdiction of the Courts of the first State. Petitioners, in their brief have considered this question under points six and

seven and have discussed some nine cases. The first of these is *Chicago Life Insurance Company* v. *Cherry*, 1917, 244 U.S. 25, 61 L. ed. 966, 37 S. Ct. 492. That case was considered by Judge Blackmun, in his opinion, in the Eighth Circuit and has nothing whatsoever to do with full faith and credit. This case concerns solely the jurisdiction of the person. That jurisdiction was litigated in the first instance and was held to be *res judicata* at a later date. It had nothing whatsoever to do with jurisdiction of real property. Judge Blackmun very amply pointed this out (R. 57) and the quotation from this case in petitioners' brief at page 43 shows conclusively that it did not involve full faith and credit.

Petitioners' next case is *Davis* v. *Davis*, 1938, 305 U.S. 32, 83 L. ed. 26, 59 S. Ct. 3. This case was carefully considered in the Blackmun opinion and placed in its proper setting (R. 62). This was a divorce case and involved jurisdiction of the person, announced a rule which is adhered to in divorce cases, but which has nothing to do with the question under consideration. The next case is *Williams* v. *North Carolina*, 1945, 325 U.S. 226, 89 L. ed. 1577, 65 S. Ct. 1092. This case very clearly supports the position of the Respondent. In it, it was said

> "*Thompson* v. *Whitman* made it clear that the doctrine of *Mills* v. *Duryee* comes into operatiaon only when, in the language of Kent, 'the jurisdiction of the court in another State is not impeached; either as to the subject matter or the person'. Only then is 'the record of the judgment * * * entitled to full faith and credit'."

It is further stated:

> "A judgment in one State is conclusive upon the merits in every other State, but only if the court of the

first State had power to pass on the merits—had jurisdiction, that is, to render the judgment."

The first head note states:

"The full faith and credit clause operates only with respect to judgments rendered by a court whose jurisdiction, either as to the subject matter or person, is not impeached."

Judge Blackmun considered this case and found it had no controlling effect.

Sherrer v. *Sherrer*, 1948, 334 U.S. 343, 92 L. ed. 1429, 68 S. Ct. 1087, is the next case. This case is simply another divorce case following the rule announced in *Davis* v. *Davis*, but it is interesting to note that Judge Frankfurter dissented arguing that collateral attack was proper.

One of the basic cases supporting Respondent's view is *Thompson* v. *Whitman*, 1874, 85 U.S. (18 Wall.) 457, 21 L. ed. 897. According to Judge Blackmun this case comprehensibly restated the principle for which the Respondent is contending (R. 57). In that opinion it was said:

"As to a foreign judgment it is perfectly well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction of the person or of the thing. 'Upon principle' says Chief Justice Marshall, 'it would seem that the operation of every judgment must depend upon the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject matter which it has determined. * * *' "

Petitioners' interpretation of this case quite obviously is entirely erroneous. They argue that where jurisdiction was litigated, in the first case, it cannot be litigated in the second case, but the opinion does not say that. This is the same erroneous interpretation of other cases reached by

Judge Duncan in his memorandum opinion. The Thompson case sets down a hard and fast rule without a clarification which completely supports the position of Respondent.

Another strong opinion favoring the Respondent appears in *Grover & Baker Sewing Machine Co.* v. *Radcliffe*, 1890, 137 U.S. 287, 34 L. ed. 670, 11 S. Ct. 92. This case was commented upon by Judge Blackmun wherein he said the principle sought by Respondent was comprehensibly stated in this case (R. 57) and wherein the judge further said that the opinion revealed particular fervor with respect to extra territorial *in rem* judgments of State courts (R. 7). In that opinion the court quoted Mr. Justice Story in his Commentaries as follows:

> "No sovereignty can extend its process beyond its own territorial limits, to subject other persons or right of property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals; * * * Such is the familiar, reasonable and just principle of the law of nations; and it is scarce supposable that the framers of the Constitution designed to abrogate it between States which were to remain as independent of each other for all but national purposes, as they were before the Revolution."

Petitioners say this case has nothing to do with the present issue but they base that conclusion on the faulty premise that jurisdiction had not been litigated in the first instance and therefore could be litigated in the second case. It has already been pointed out that this is not correct.

In *Adam* v. *Saenger*, 1938, 303 U.S. 59, 82 L. ed. 649, 58 S. Ct. 454, the court said:

> "In a suit upon the judgment of another State the jurisdiction of the court which rendered it is open to judicial inquiry".

And the court further said:

> "When the matter of fact or law upon which jurisdiction depends was not litigated in the original suit, it is a matter to be adjudicated in the suit founded upon the judgment."

According to Judge Blackmun this decision is one of the basic decisions and fully supports Respondent's position. This, however, is a case upon which Judge Duncan went astray and which has caused petitioners to adopt an erroneous viewpoint. The opinion simply says that jurisdiction in a situation of this kind is always open to collateral attack. It further says that if jurisdiction was not questioned in the first case, it must be questioned in the second. Petitioners seek to add a third interpretation which is that if jurisdiction was questioned in the first case, it cannot be questioned in the second. It will be noted that nowhere in the opinion is there language to support this.

Milliken v. *Meyer*, 1940, 311 U.S. 457, 85 L. ed. 278, 61 S. Ct. 339, is another basic decision and one relied upon by Judge Blackmun (R. 57). In this case it was said:

> "Where a judgment rendered in one State is challenged in another, a want of jurisdiction over either the person or the subject matter, is, of course, open to inquiry."

Certainly this is the very clear and definite statement of the rule for which Respondent is contending. Petitioners, however, seek to distinguish this case by again saying that jurisdiction was not questioned in the first instance and therefore, cannot be questioned at this time. The

opinion simply does not say that and such an argument cannot be read into it.

That this court still adheres to this rule is clearly demonstrated in the case of *Western Union Telegraph Company* v. *Pennsylvania*, 1961, 368 U.S. 71, 7 L. ed. 2d 139, 82 S. Ct. 199. This opinion was relied upon by Judge Blackmun and in the opinion the court said:

> "A state court's judgment need not be given full faith and credit by other states as to parties or property not subject to the jurisdiction of the Court that rendered it."

In our opinion petitioners' discussion of this case reaches an untenable position which is directly contrary to the rule of law stated in the opinion.

The question under discussion has been considered in a number of textbooks and encyclopedias. There are many quotations which are of value. In 81 C.J.S. 903, it is said:

> "Records and proceedings of courts of other States are entitled to full faith and credit only insofar as such courts have jurisdiction of the subject matter and the parties. And the facts necessary to give jurisdiction to the court rendering the decree may be inquired into. * * * A State not a party to the exertion of judicial authority in another State but seriously affected by it, may in the exercise of its own power determine the truth of the record recital of the essential fact of domicile."

In the Restatement of the Law, Judgments, paragraph 5 (i), it is said:

> "As a personal judgment rendered against the defendant over whom the State has no jurisdiction is void, so a judgment purporting to affect interests in things is void if the things are beyond the jurisdiction

of the State. This is true not only where the judgment is a judgment in rem, purporting to bind the interests of all persons in the thing, but also where it is a judgment quasi in rem, purporting to bind the interests of designated persons."

In the same section, at sub-paragraph (k) it is said:

"The courts normally cannot exercise jurisdiction over a sovereign, domestic or foreign, or over its property, without its consent."

Paragraph 4 (b), says:

"If a judgment in rem or quasi in rem is rendered by a court of a State and the State does not have jurisdiction to subject to its control the thing which is the subject of the action, the judgment is void."

and paragraph 5 makes the same statement, with no limitation whatsoever.

Under paragraph 71 (b), of the same volume appears this statement:

"The courts of one State cannot directly determine the question of title to land in another State, nor can they do so incidentally in the doctrine of collateral estoppel."

This is directly in line with a statement found in the Restatement of the Law, Conflict of Laws, where it is said at paragraph 48:

"An immovable thing is subject to the jurisdiction of the State in which it is."

Under the comment to this section appears the statement:

"Since the immovable is of such a character that it cannot come within the power of any other state without a change in the territory of both States."

Both C.J.S. and Am. Jur. contain other statements which are of value and enlightening. For instance in 50 C.J.S., at page 38, it is said:

> "A void judgment, such as one rendered by a court not having jurisdiction of the parties or the subject matter, does not merge the cause of action or operate as a bar to further litigation."

And at page 502 of the same volume, it is said:

> "A party sought to be bound or affected by the judgment of a court of a sister State may impeach its validity and escape its effect by showing that the court rendering it had no jurisdiction over the parties or over the subject matter."

It is said in 30A Am. Jur., at page 176:

> "It is essential to the proper rendition of a judgment that the court have jurisdiction of the subject matter. A judgment rendered without jurisdiction of the subject matter is void. The operation of this rule is not affected by the judicial discretion of the court."

And at page 197 it is stated:

> "A void judgment is not entitled to the respect accorded a valid adjudication, but may be entirely disregarded or declared inoperative by any tribunal in which effect is sought to be given to it. • • •. It may be attacked by a person adversely affected by it in any proceeding, direct or collateral, and at any time. • • • In other words, a void judgment is regarded as a nullity, and the situation is the same as it would be if there were no judgment."

A somewhat similar pronouncement appears in 2 A.L.R. 2d, at page 1188, wherein it is said:

> "It is a fundamental rule of international jurisprudence that every State or nation possesses an ex-

clusive sovereignty and jurisdiction within its own territory. The consequence of this maxim is that no State can by its laws, and no court can by its judgments or decrees, directly bind or affect property or persons beyond the limits of that State."

It seems apparent from the above discussion that the full faith and credit clause of the Federal Constitution clearly does not apply to the situation which is now presented to this Court and that the Respondent was not precluded by such clause from collaterally attacking in the Missouri courts the Nebraska judgment.

(B) Res Judicata.

As Judge Blackmun very aptly pointed out in his opinion, matters of personal jurisdiction and matters of subject matter jurisdiction have not received identical treatment from the Court (R. 57). There are a number of cases where the Court had jurisdiction of the person and it was held that the judgment could not be collaterally attacked later in another court. To such effect is *Chicago Life Insurance Co.* v. *Cherry*, 1917, 244 U.S. 25, 61 L. ed. 966, 37 S. Ct. 492 and *Baldwin* v. *Iowa State Traveling Men's Association*, 1931, 283 U.S. 522, 75 L. ed. 1244, 51 S. Ct. 517. These two opinions which are cited by petitioners as supporting their view simply announce the doctrine regarding jurisdiction of the person and say nothing whatsoever about jurisdiction of subject matter. They in no way apply to a case involving subject matter jurisdiction where the subject matter is real property.

The case of *Forsyth* v. *Hammond*, 1897, 166 U.S. 506, 41 L. ed. 1095, 17 S. Ct. 665, at first glance presents some question but on closer study can easily be differentiated. All the litigation in that case involved litigation in the courts of one state. The case did not involve the jurisdic-

tion of the court of another State. The court specifically emphasized what it called "another aspect of this case", namely that the controversy was one peculiarly within the domain of State control. The court said that Federal jurisdiction rested on adverse citizenship and not on any Federal constitutional right (R. 59-60).

Petitioners next rely on *Stoll* v. *Gottlieb*, 1938, 305 U.S. 165, 83 L. ed. 104, 59 S. Ct. 134. This was a bankruptcy case and had nothing whatsoever to do with the jurisdiction of real property. It did not overrule an earlier and contrary result in the case of *Vallely* v. *Northern Fire & Marine Insurance Co.*, 1920, 254 U.S. 348, 65 L. ed. 297, 41 S. Ct. 116, and arrived at its result on a ground not relied upon in the Vallely case. The interesting thing about this case, however, and a point which is entirely overlooked by petitioners, is the additional statement made by the court in that case at page 176 of 305 U.S. wherein the court stated:

> "To appraise the cases dealing with status and transfer of title to real estate seems outside the scope of the present inquiry. The rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing upon matters of status and real estate titles."

It is thus quite apparent that in the mind of this court itself this case has nothing to do with jurisdiction involving real property.

Petitioners next assert that the case of *Treinies* v. *Sunshine Mining Co.*, 1939, 308 U.S. 66, 84 L. ed. 85, 60 S. Ct. 44, supports their position. This is a rather interesting case and contains unexplainable inconsistencies. This was pointed out by Judge Blackmun in his opinion (R. 63-64). The significant facts in this case are that an Idaho

Court questioned a judgment of a Washington court and held that the Washington court did not have jurisdiction; in a latter proceeding it was held that the Idaho court was well within its rights to examine into the jurisdiction of the Washington court and this court, in its opinion, said:

> "The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question."

Jackson v. *Irving Trust Co.*, 1941, 311 U.S. 494, 85 L. ed. 297, 61 S. Ct. 326, is petitioners' next authority. This case was thoroughly discussed by Judge Blackmun (R. 65). It had nothing to do whatsoever with title to real property, it had nothing to do with subject matter jurisdiction of an object claimed by different States and all proceedings were in the court of one state. The opinion caused Judge Blackmun no concern and we feel it requires no further comment.

Next we come to the case of *Chicot Co. Drainage District* v. *Baxter State Bank*, 1940, 308 U.S. 371, 84 L. ed. 329, 60 S. Ct. 317. Judge Blackmun considered this case and his comment was it did not involve real estate (R. 64). That this opinion of Judge Blackmun's announced a very logical conclusion is brought out by the opinion from this court in *United States* v. *United States Fidelity & Guaranty Co.*, 1940, 309 U.S. 506, 84 L. ed. 894, 60 S. Ct. 653, where this court said in speaking of the Chicot County case:

> "In the Chicot County case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination * * *. No examination was made of susceptibility to such objection of numerous groups of judgments concerning status, extraterritorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts."

It is thus apparent that the Chicot opinion was not intended to apply to questions involving real property or

strictly jurisdictional and quasi-jurisdictional matters. Judge Blackmun's interpretation of this case was quite correct.

This court approved collateral attack in *Vallely* v. *Northern Fire & Marine Insurance Co.*, 1920, 254 U.S. 348, 65 L. ed. 297, 41 S. Ct. 116. This was a bankruptcy court case wherein an insurance company had been declared bankrupt under an involuntary petition despite the fact that the bankruptcy act expressly excepted insurance companies. No appeal was taken. The company later moved to vacate the judgment for lack of jurisdiction. The motion was sustained and was approved by this court. This case presents a situation where policy was emphasized (R. 60). This court in that case was called upon to comment upon the argument in the first place that any litigated issue should be open only to direct attack and the argument in the second place that courts may not act beyond the power and authority conferred upon them. The court said, page 354 of 254 U.S.:

> "Which of the propositions shall prevail in a given case cannot be dogmatically asserted, and cases of their consideration and application can be cited against each other."

In 1930 and ten years after the decision in the preceding case this court handed down an opinion in *Grubb* v. *Public Utilities Commission*, 1930, 281 U.S. 470, 74 L. ed. 972, 50 S. Ct. 374. In this case a State Public Service Commission had denied an applicant an operating certificate for a bus route. On his appeal the Supreme Court of the State affirmed it. The applicant then pursued an injunction suit in Federal Court. The commission pleaded the same judgment as a bar. This court, in holding that the prior judgment was not a bar said:

> "That the state court had jurisdiction of the parties is plain and not questioned. But the appellant does question that it had jurisdiction of the subject matter —and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. Of course, he is entitled to raise this question notwithstanding his prior inconsistent attitude, for jurisdiction of the subject matter must arise by law and not by mere consent."

Petitioners seek to laugh this case away by saying it involved an application of the rule that jurisdiction of the subject matter may not be conferred by consent. The opinion does not substantiate that. The opinion says in so many words that the petitioner was entitled to question jurisdiction whether he consented or not, for jurisdiction of the subject matter must arise by law and not by mere consent.

This case was discussed and relied upon by Judge Blackmun (R. 60-61).

In 1940 appeared the opinion in the case of *United States* v. *United States Fidelity & Guaranty Co.*, 1940, 309 U.S. 506, 84 L. ed. 894, 60 S. Ct. 653. This case has been analyzed in the Blackmun opinion (R. 64-65) and has been discussed by petitioners in their brief. The opinion allowed collateral attack on the question of jurisdiction. It emphasized heavily the question of policy.

One of the most enlightening cases is *United States* v. *171.74 Acres of Land*, 266 F. Supp. 322, l.c. 324. Litigation here started when a petition was filed to register a judgment of the District Court of Iowa. This judgment involved title to land. A Nebraska court directly passed on the Iowa court's question of jurisdiction and said the Iowa judgment was void because Iowa had no jurisdiction over the land since it was in Nebraska. It further said:

"Therefore, the Iowa judgment was not entitled to full faith and credit or to registration as a foreign judgment."

This judgment was affirmed by the Nebraska Supreme Court. An attack was then made on the judgment in the Federal District Court of Nebraska and that court said:

"This evidence is clearly an attempt to relitigate the exact issues determined by the Courts of Nebraska. Whether this may properly be done is the key issue for the court to decide." (l.c. 324).

The opinion is too long to quote in detail but it contains many pertinent statements and points out that there could be no further litigation in Nebraska because Nebraska had already litigated the matter. On the other hand, the opinion agreed that Nebraska examined the jurisdiction of the Iowa Court, found Iowa did not have jurisdiction of the subject matter and then refused full faith and credit to the Iowa judgment.

There is in this opinion an additional statement which, when it is once understood, and that is somewhat difficult, answers another argument advanced by petitioners. The court said at l.c. 325:

"Where a court of one state denies effect of a judgment of another State on the ground of absence of jurisdiction, although there had been a finding of the presence of such jurisdiction in a contested proceeding in the latter State, and the former judgment is not reversed on appeal, it has been held that the latter judgment of the former will be given effect as *res judicata*."

The court also said in quoting from Section 10 (e) of the Restatement of Judgment:

"Thus, if in the first action the court determines that it has jurisdiction over the subject matter, but in

a second action between the parties the court determines that the court in the first action had no jurisdiction over the subject matter, then in a third action between the parties the court is bound by the determination in the second action."

When these quotations are once understood it appears clearly that the court has said where a matter has been litigated in one State and then is litigated in a second State because of the alleged lack of jurisdiction of the first State of the subject matter, and the second State determines that the first State did not have such jurisdiction, then if a third action is brought between the parties the court is bound by the determination in the second action.

Many of the cases cited under Point A, *supra*, apply to the question of *Res Judicata*. Among them *Thompson* v. *Whitman*, *Milliken* v. *Meyer* and *Grover & Baker Sewing Machine Co.* v. *Radcliffe*. All of them indicate that *Res Judicata* does not apply in the situation which we are discussing.

All the quotations from textbooks, encyclopedias and other works which were set out under Point A, *supra*, with the exception of the quotation from 81 C.J.S. 903, apply equally to this question of *Res Judicata*. A further quotation to the same effect appears in 30 A Am. Jur., at page 398, wherein it is said:

"In order that a judgment may operate as a conclusive determination of a cause of action, or of facts litigated therein, it is necessary that it should have been rendered by a court of competent jurisdiction of the parties and of the subject matter. A judgment which is void because rendered without jurisdiction is not *res adjudicata*."

The complexity of the questions involved here is well demonstrated in the treatment these questions have re-

ceived in the Restatement of the Law. In 1943, in the Restatement of the Law, Judgments, at paragraph 10 appeared this statement:

> "Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction. Among the factors appropriate to be considered in determining that collateral attack should be permitted are that
>
> (a) The lack of jurisdiction over the subject matter was clear;
>
> (b) The determination as to jurisdiction depended upon a question of law rather than of fact;
>
> (c) The court was one of limited and not of general jurisdiction;
>
> (d) The question of jurisdiction was not actually litigated;
>
> (e) The policy against the court's acting beyond its jurisdiction is strong."

In the same year in the Restatement of the Law, Conflict of Laws, at paragraph 451, appeared this statement:

> "The party appearing and participating in proceedings in a court of any State will be precluded from questioning the jurisdiction of the court over his person in any subsequent proceeding in that State or in any other State if the court in which he appeared purported to render a judgment against him."

There was appended to this, however, the following caveat:

"The institute expresses no opinion whether and how far a party appearing and participating in the proceedings in a court of any State is precluded from subsequently questioning the jurisdiction of the court over the subject matter of the action in the courts of that State or any other State if the court in which he appeared purported to render a judgment against him."

There was at that time some question in the minds of the institute concerning this proposition. By 1948, however, the situation had cleared. In the 1948 supplement, Restatement of the Law, Conflict of Laws, paragraph 451, sub-paragraph 2, the caveat has disappeared and the section is identical with Section 10 of the Restatement of Judgments.

Now let us analyze this statement. It simply says that if a court has decided a matter and has determined that it had jurisdiction of the subject matter, its judgment cannot be collaterally attacked on the grounds of jurisdiction unless the policy underlying the doctrine of *res judicata* is outweighed by the policy against permitting the court to act beyond this jurisdiction. Among other factors five specific factors are set out which are appropriate to be considered in determining that collateral attacks should be permitted. The statement thus is not that there are only five exceptions, but that five among others are listed in the Restatement. Further, each exception stands on its own feet. If any exception exists, that is sufficient grounds for allowing collateral attacks. Now let us look at the factors.

It can be conceded that factors (b), (c) and (d) are not under consideration. Factor (e) was discussed by Judge Blackmun. Factor (a) was not. It is Respondent's position that both of these factors are in this case.

According to the Restatement, collateral attack is allowed if the lack of jurisdiction over the subject matter was clear. Petitioners' discussion of this question ridicules the proposition and says it is an understatement to say that the court's lack of jurisdiction is not particularly clear. We suggest that the record indicates otherwise. Judge Duncan handed down a lengthy opinion discussing the factual elements of this litigation. His opinion indicates he made an exhaustive study of all the evidence. In his opinion he said "To me, the evidence clearly reveals that prior to the cut-through and the formation of the chute, the main channel was to the south and west of the land in controversy." (R. 38). He again said "I am convinced that the evidence clearly shows that prior to the formation of the island in controversy, the main channel of the river was to the south and west thereof." (R. 39).

He again said "It is my definite conclusion that under all the evidence in this case the land was located in Missouri at the time plaintiff acquired her deed under the swamp-land title act," (R. 40), and he finally said "It is my belief that the evidence clearly reveals that the land lies in Missouri." (R. 42). It thus appears that to Judge Duncan the record was clear and convincing that the location of this land was fixed and that it was Missouri land and if it was Missouri land it belonged to the Respondent Duke. In other words the lack of jurisdiction over the subject matter was entirely clear to Judge Duncan.

We have been reaching factor (e), the policy factor, for some time and we have previously pointed out that frequently a question of policy is important.

We can perhaps do no better than to paraphrase in a sense what Judge Blackmun had to say along these lines (R. 69). This case involves the traditional policy of im-

munity of the State's real property from direct disposition by a sister State judgment. This court, by its previous opinions, has suggested the existence of a real estate policy of this kind. Most of the Supreme Court cases which have refused to follow the principle of *res adjudicata* in problems of subject matter jurisdiction, have primarily been real estate cases. The later Supreme Court cases which follow *res adjudicata* and allow it to be set up as a barrier do not involve real estate. Moreover, they specifically indicate that the opinions in those cases were not intended to control real property situations. There was language to this effect in *Stoll* v. *Gottlieb*, and there was similar language in *United States* v. *United States Fidelity & Guaranty Company*, which limited the holding in the Chicot case.

There are many cases from this court which hold that the full faith and credit clause does not preclude collateral inquiry into subject matter jurisdiction. Many of these cases, in the words of Judge Blackmun, "Reveal particular fervor with respect to extraterritorial *in rem* judgment of State courts." This view is found in *Grover & Baker Sewing Machine Co.* v. *Radcliffe* and *William* v. *North Carolina*, which cases have previously been discussed, and *Carpenter* v. *Strange*, 141 U.S. 87; *Fall* v. *Easton*, 215 U.S. 1; *Olmstead* v. *Olmstead*, 216 U.S. 386; *Cook* v. *McGee*, 237 U.S. 611, and *Milwaukee County* v. *M. E. White Company*, 296 U.S. 268. These latter cases involve various factual situations, but all announce the rule that the courts of one State may not pass upon land titles to land lying in another State.

For instance, in *Fall* v. *Easton*, it is said:

> "No principle is better established than that the disposition of real estate whether by deed, descent or by any other mode must be governed by the law of the State where the land is situated."

There are other pronouncements from this court where the factual situations are entirely different, but where the court has gone out of its way to make pronouncements on this question. In *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. ed. 565, the Court said:

> "• • • every State possesses exclusive jurisdiction and sovereignty over • • • property within its territory. • • • The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over • • • property without its territory. • • • 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding such • • • property in any other tribunals.' Story, Confl. Laws, Sec. 539."

A similar view is expressed in *Huntington* v. *Attrill*, 1892, 146 U.S. 657, 26 L. ed. 1123, 13 S. Ct. 224. It was there said:

> "Proceedings *in rem* to determine the title to land must necessarily be brought in the State within whose borders the land is situated, and whose courts and officers alone can put the party in possession."

From all of this it is readily apparent that there is a definite policy against allowing one state to pass upon real estate titles in another. When a State does take this action, the second State is not precluded from requestioning the matter either by full faith and credit or *res judicata*.

Petitioners assert that if the Blackmun opinion is affirmed it would settle nothing. That is not correct. According to *United States* v. *171.74 Acres of Land*, in a situation of this kind, the second adjudication is the binding adjudication in any further litigation. The same statement appears in sub-paragraph (e) of paragraph 10 of the Restatement of the Law, Judgments. Now let us see what that means in this case.

If the Blackmun opinion is affirmed this matter will go back to the District judge where it will be decided on its merits. If that judgment is not appealed it will be binding on both parties. If either party desires to appeal they can go directly to the Eighth Circuit and from there they will have an opportunity to return to this court.

Petitioners argue that if *res judicata* is not applied, there will be endless litigation and that endless litigation is not desirable. They argue there must be an end to litigation. What petitioners overlook is the question of whether it is more desirable to shorten litigation or to protect the rights of an individual. It would seem that courts everywhere have always made the rights of an individual paramount. In the early days in Missouri and before the Civil War, in litigation entitled *Charlotte* v. *Choteau*, 11 Mo. 193, 21 Mo. 590, 25 Mo. 465, 33 Mo. 194, the trial courts were willing to try the issues four times, and the Supreme Court was willing to hear it four times before Charlotte secured her personal right and was declared not to be a slave. There the rights of a poor, ignorant colored woman, born in slavery, were held far more important than the desire to terminate litigation. In innumerable cases this court has zealously protected the rights of an individual and required repeated trials of various issues in order that the individual might be fully protected.

Certainly in the instant case the rights of Julia Duke as an individual and the rights of the courts of the sovereign State of Missouri to determine for themselves the location of the land in controversy, is of far greater importance than to say this litigation should be terminated.

Law School Articles.

As to the Law School Articles, they are, of course, only the personal opinions of those writers. The Kansas Article

enunciates nothing new. It cites no cases involving titles to real estate which support the views of the writer. It overlooks the theory of States' rights and curtails the sovereignty of the individual States. The writer says at page 63 of petitioner's brief, that four of the five tests set out by the Restatement were against permitting collateral attack. Obviously the writer didn't study the record very good. He has overlooked that these five factors are simply five factors among others. He has overlooked the very pertinent statements of Judge Duncan indicating clearly that factor 1 did apply. He has further completely overlooked the basic principle announced by Story, reiterated in many decisions of this case, and a legal principle which has undoubtedly been controlling in this country for many years.

While the Pennsylvania article takes a little different viewpoint, it arrives at the same ultimate conclusion as the Kansas article but again after demonstrating a fatal lack of knowledge of the legal principles involved in the factual issues. It asserts that the court should first have looked to the law of Missouri to ascertain if that State would give effect to the Nebraska judgment without the compulsion of the full faith and credit clause. It admits there is no Missouri law on that question. Strangely enough, the article completely overlooks the fact that Nebraska completely failed to give full faith and credit to an Iowa judgment, even though the full faith and credit clause was in effect (*United States v. 171.74 Acres of Land*). Remember in that case the Nebraska court did inquire into the jurisdiction of the subject matter by the Iowa Court, and the subject matter was land.

This article again cites no cases involving jurisdiction of subject matter which is real estate. It says:

"No assertation was made that the Nebraska courts rendered an unfair judgment."

(Petitioners' brief, page 74). This statement, of course, is utterly absurd. The basic contention by Respondent is that the Nebraska judgment was completely unfair because it erroneously assumed jurisdiction of land to which it did not have jurisdiction. Further evidence that the judgment was unfair is borne out by the repeated statements of Judge Duncan to the effect that the land was always clearly Missouri land. Again, the article simply expresses the personal views of the author.

That the decision of the Nebraska Court was extremely unfair is abundantly indicated in the record. The original action in the District court in Nebraska involved not only the land in controversy here but land allegedly owned by Respondent's mother, Nellie Duke. Gene Durfee claimed all of that land (R. 9-10). The District court, in its opinion, without any explanation whatsoever, forgot the Nellie Duke land, but awarded the Julia Duke land to Gene Durfee. There is no possible explanation in the record of this action (R. 15-16).

When the Supreme Court of Nebraska affirmed this opinion, it also forgot the Nellie Duke land, but awarded the Julia Duke land to Durfee. How it arrived at its conclusion is impossible to understand. This opinion appears beginning at page 17 of the record.

It is thus quite apparent that the Nebraska Court arbitrarily cut the land in two and let Nellie Duke have part of it and gave the rest to Mr. Durfee. Absent an explanation for this action, and there is no such explanation, both judgments on their face are unfair and unwarranted. The writer of the Law Journal Article obviously had no understanding of the basic facts of the case when the article was written.

CONCLUSION.

It is the position of the Respondent that the Blackmun opinion was a full, *legal* and accurate discussion of the legal principles involved in this matter and that his conclusions are accurately based on the law as it has been declared by this court. It is further submitted that the Blackmun opinion together with the briefs of Petitioners and some slight help from the Respondent, have covered practically all of the controlling decisions from this court. It is submitted that it is fundamental and has been fundamental since the founding of this government, that each sovereign state has the right and exclusive jurisdiction to determine for itself questions involving real estate lying within the confines of each individual State. Any different policy would lead to National chaos so far as the individual States are concerned.

We submit that Judge Blackmun correctly decided the issues of this matter, that Respondent is not bound by the decision of the Nebraska court, that neither full faith and credit nor *res adjudicata* apply in this matter and that the opinion in the Eighth Circuit Court of Appeals must be affirmed. For those reasons Respondent respectfully prays that the judgment of the Court of Appeals be affirmed in all respects.

Respectfully submitted,

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